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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission maintains adjustments to merger filing process made in response to COVID-19 crisis while underscoring need to protect competition

The European Commission (the "Commission") continues to encourage companies to delay any planned merger notifications until further notice in light of the COVID-19 pandemic, as it anticipates that it may face difficulties in collecting the information necessary to conduct its review, in particular from third parties such as customers and competitors. The Commission is also maintaining its relaxed rules regarding the acceptance of electronic submissions. Competition authorities in several Member States, as well as the UK Competition and Markets Authority, have undertaken similar measures.

While the Commission's merger review process has slowed, and changes in market dynamics due to the pandemic may affect its assessment of the transactions currently under review, the Commission has also warned that it will not exercise a lower level of scrutiny as a result of COVID-19. In particular, on 24 April, Commissioner Margrethe Vestager remarked that companies could not expect to use the current crisis as a "shield" to acquire distressed businesses where the resulting merger would prove detrimental to consumers or delay economic recovery. She noted that the EU's strict criteria would continue to apply to the acquisition of competing businesses.

Commission conditionally clears Gategroup's acquisition of LSG's European catering business

On 3 April 2020, the European Commission (the "Commission") approved Gategroup's acquisition of the Lufthansa Service Group's European business ("LSG EU"). Gategroup is a Swiss company that provides catering, retail and other airline services globally. German-based LSG EU is active in train and airline retail and catering services and equipment. Gategroup and LSG's activities overlap with regard to the provision of in-flight catering.

The Commission expressed concerns that the transaction would result in Gategroup holding a quasi-monopoly position or leaving, at most, one competitor in the markets for in-flight catering along certain European airline routes. The Commission considered that this situation was exacerbated by high barriers to entry, particularly for potential competitors that did not already offer in-flight or airport-based catering linked to those routes. To resolve these concerns, Gategroup offered to divest the overlapping catering businesses through a commitments package that included catering contracts, equipment and personnel. In accepting these commitments, the Commission stressed that while the airline sector was particularly affected by COVID-19, it was imperative that competition remain strong as soon as the market recovers.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority temporarily relaxes commitments in advertising merger due to COVID-19 pandemic

On 26 March 2020, the Austrian Federal Competition Authority ("FCA") granted a request to amend the commitments in the market for free TV and television advertising undertaken as part of a merger cleared in 2017. The FCA had cleared the acquisition by Austrian-based ProSiebenSat.1Puls 4 GmbH ("Puls 4") of Austrian ATV Privat TV GmbH and ATV Privat TV GmbH & Co KG ("ATV") subject to strict commitments prohibiting certain forms of cooperation between Puls4 and ATV.

In the wake of the COVID-19 crisis, Puls 4/ATV submitted a request to amend the commitments to permit collaboration relating to news and information in order to enable the companies to respond to the pandemic. The FCA, the Federal Cartel Prosecutor and the Austrian Communications Authority KommAustria agreed to this request, pursuant to a clause allowing the three authorities to amend the commitments under exceptional circumstances. As a result, the commitments are suspended only insofar as is strictly necessary to maintain newsroom operations, and any deviations must be justified. The suspension applies until the lockdown is lifted or until 30 April 2020, whichever is earlier.

Austrian Cartel Court imposes gun-jumping fine on Castanea Rubra Assets

On 27 March 2020, the Austrian Federal Competition Authority ("FCA") announced that, pursuant to its request, the Cartel Court had imposed a fine of € 100,000 on Castanea Rubra Assets GmbH. Castanea Rubra Assets GmbH had acquired 94% of the shares of German-based car parts manufacturer Neue Halberg Guss GmbH, but had notified the transaction only retrospectively. This violated the notification requirements under the Austrian Cartel Law. The Cartel Court's decision is final.

UNITED KINGDOM

CMA blocks *Sabre/Farelogix* deal despite COVID-19-related uncertainty and limited UK nexus

Despite the uncertain future facing the global travel industry as a result of the COVID-19 pandemic, on 9 April 2020, the UK's Competition and Markets Authority ("CMA") announced its decision to block the proposed *Sabre/Farelogix* transaction, citing concerns that "UK passengers [would] miss out on the benefits from continued innovation". The CMA's decision came just days after the transaction was given the green light to proceed by the US District Court in Delaware.

Sabre is one of three major suppliers of global distribution systems ("GDS"). GDS are the predominantly used technology to connect airline content (e.g., information on flight fares, availability, schedules, and other aspects of an airline's offer) with travel agents. Farelogix is a pioneer of innovative technology that connects airlines directly with travel agents, providing an alternative to GDS. It also supplies software that enables airlines to include ancillary products (such as extra legroom, baggage, and in-flight meals) in their booking systems.

Sabre announced the acquisition of Farelogix for $360 million (approximately €328 million) in November 2018. The CMA opened a Phase II investigation on 2 September 2019. The CMA's concerns related to two markets: (1) the supply of merchandising solutions to airlines on a worldwide basis and (2) the supply of distribution systems to airlines on a worldwide basis.

Supply of merchandising solutions to airlines

Both Sabre and Farelogix provide airlines with IT solutions to manage various tasks within their booking systems. Sabre provides IT solutions that cater to airlines' "core" needs (e.g., central reservation, inventory and departure control) (referred to as "core PSS"), as well as IT solutions enabling airlines to offer products that are ancillary to these core functions ("non-core PSS"). Farelogix supplies non-core PSS, but not core PSS.

The CMA's focus was on the supply of a subset of non-core PSS: "merchandising solutions". Merchandising solutions enable an airline's offer to include options to purchase various additional products, such as extra luggage allowance, seat upgrades and in-flight meals. While Sabre's merchandising solutions can only be used in conjunction with its own core PSS, Farelogix's merchandising solutions have much broader compatibility.

The CMA found that, absent the transaction, Sabre has a strategic incentive to enhance its merchandising capabilities in order to compete with Farelogix's more versatile product. The CMA found that the transaction could jeopardise Sabre's continued investment and lead to a loss of innovation in merchandising solutions. This would result in less consumer choice, fewer new features, upgrades being released more slowly, as well as higher prices stemming from the loss of a significant competitor in merchandising procurement.

Supply of distribution solutions to airlines

While merchandising solutions facilitate the "packaging together" of airlines' products and services, the CMA was also interested in the subsequent level of the supply-chain: technological solutions for the distribution of such "packaged" airline content.

The merging companies overlap in IT solutions for the indirect distribution of airline content via travel agents (rather than directly, via airlines' own websites and call centres). Global distribution systems ("GDS") are the predominant means by which airline content is distributed to travel agents. Sabre is one of three major suppliers of GDS. Farelogix is not a GDS supplier; however, it is active in the supply of alternative technological solutions for the distribution of airline content. These alternative technological solutions by-pass the GDS, enabling direct contact between airline and travel agent.

Whilst GDS is currently the most common means (approximately 90%) of distributing airline content to travel agents, the CMA pointed to indications of imminent change in the industry. From an airline's perspective, a weakness of GDS is that it is GDS (as opposed to airlines) that put together the package offered to passengers (including route, seat type, schedule, price, etc.). As a result, there is demand for an alternative technology that provides airlines with greater control over offer content.

Farelogix has played an instrumental role in the development of a new messaging standard, which allows dynamic personalised offers to be created by airlines and to be communicated to and accessed by travel agents in real time. The CMA reported that the majority of airlines have a strategy to adopt this new messaging standard and also that Sabre plans to develop its capabilities in this field as a response to the threat the development represents to its GDS business.

The CMA emphasised that Farelogix's role in pushing GDSs to improve their offerings to airlines was a much better indicator of the competitive constraint it posed than was its small market share. The CMA concluded that the transaction would reduce innovation in distribution solutions, harming airlines and travel agents.

Relevance of COVID-19 to CMA's merger review

Not only did the CMA's decision come just two days after clearance was obtained in the US, it was seemingly unaffected by the COVID-19 crisis, despite the fact that the merging parties operate in supply chains severely impacted by the pandemic. In the press release accompanying the announcement of its decision, the CMA recognised that its decision comes "at a time of uncertainty and disruption in the global travel industry due to the COVID-19 pandemic".

While present circumstances make it difficult to foresee how the competitive situation will develop in these markets either with or without the transaction, the CMA noted that it has seen no evidence of a "disproportionate impact" on Sabre or Farelogix with respect to the COVID-19 crisis relative to the rest of the industry. The CMA stated that the parties failed to make representations about how the pandemic impacts the competitive assessment and did not assert that either party would exit the market or become significantly weaker relative to other competitors.

CMA claims jurisdiction despite limited UK nexus

The merging parties also made submissions questioning the CMA's jurisdiction to review the transaction in the first place. The CMA has jurisdiction to review a proposed merger when either the target's UK turnover exceeds £ 70 million, or the merging parties have a 25% "share of supply" for a product or service in the UK (and the merger results in an increment/increase to that share of supply).

As Farelogix generates very little, if any, UK turnover, jurisdiction was claimed on the basis of the "share of supply" test (defined by the CMA in this case as "*supply of IT solutions to UK airlines for the purpose of airlines providing travel services information to travel agents, to enable travel agents to make bookings*").

Although Sabre alone meets the 25% share of supply threshold through its provision of GDS to UK airlines, the merging parties disputed that the purchase of Farelogix would lead to an increment. At most, Farelogix provides IT solutions to one UK airline, British Airways ("BA"), but only in order to fulfil its obligations under a separate agreement with American Airlines. Pursuant to this agreement, Farelogix provides IT solutions to partners of American Airlines that market and operate a "segment" of an American Airlines booking. For example, if BA were to operate the London to Shanghai segment of an American Airlines booking for a journey from New York to Shanghai (via London), Farelogix may provide IT solutions to BA with respect to the London to Shanghai segment.

The merging parties submitted that Farelogix contracted with American Airlines and therefore did not provide services to BA. However, the CMA disagreed, concluding that "the effect of the agreement, when considered in the context of a number of other related agreements, is that British Airways [is the recipient of the relevant Farelogix IT solutions]". The CMA stated that while the revenue Farelogix received from these bookings was small, UK law does not require a minimum increment to confer jurisdiction.

Concluding remarks

Despite the US District Court's decision to permit the transaction to proceed in the US just days before, the complications caused by COVID-19, and the question marks raised over its jurisdiction, the CMA was not deterred from blocking the transaction. The CMA's decision is therefore a further indication of its increasingly bold, interventionist approach and a demonstration of its willingness to claim jurisdiction over transactions with a limited UK nexus.

This was also the first instance of the CMA indicating the narrow circumstances in which the COVID-19 pandemic may affect the outcome of its merger review. Its statements in this case suggest that the impact of COVID-19 must be so severe that one of the parties is considered to be a failing firm, or that the merging parties' ability to compete is likely to be disproportionally affected, relative to their rivals.

Impact of COVID-19 on Deliveroo persuades CMA to provisionally clear investment by Amazon

On 17 April 2020, approximately one week after the CMA found COVID-19 not to be an obstacle to its decision to block the *Sabre/Farelogix* transaction, the CMA announced its provisional clearance of the acquisition by Amazon of a minority shareholding and certain rights in Deliveroo "in light of a deterioration in Deliveroo's financial position as a result of coronavirus".

On 27 December 2019, the CMA referred the deal to a Phase II review due to concerns that it could lead to a substantial lessening of competition in the market for online restaurant platforms and/or the market for online convenience groceries. However, in light of the substantial changes to the market brought about by the pandemic and the consequent negative impact on Deliveroo's business (for example, due to substantial restaurant closures), the CMA reconsidered its position.

Specifically, the CMA assessed whether COVID-19's impact on Deliveroo had created an "exiting firm scenario" enabling Deliveroo to avail itself of the "failing firm" defence. The CMA applied a three-stage test, considering: (1) whether Deliveroo would have left the market absent the transaction; (2) whether there was a substantially less anti-competitive investor/purchaser available than Amazon; and (3) what would happen in the event that Deliveroo exited the market (in other words, how would this impact competition and consumers).

The CMA found that Deliveroo's exit from the market would have been "inevitable without access to significant additional funding". It also considered that only Amazon appeared willing and able to provide the investment that would be required as the COVID-19 pandemic had "severely limited" financing available for "early-stage businesses" like Deliveroo. Furthermore, the CMA predicted that allowing Deliveroo to exit the market would lead to a reduction in quality (in terms of price and service) of the offerings of the remaining online restaurant platforms, Just Eat and Uber Eats.

The CMA's decision is not yet final. There is now a three-week consultation period on the provisional findings with the statutory deadline for the CMA's final report falling on 11 June 2020.

The CMA has been particularly active in the market for online restaurant platforms in recent weeks. On 23 April 2020, the CMA gave the green light to Just Eat's merger with Takeaway.com after finding that there was no material likelihood of Takeaway.com re-entering the UK market absent the transaction.

CMA guidance summarising relevance of COVID-19 to its merger review

Since its *Amazon/Deliveroo* decision on 17 April 2020, the CMA has issued guidance in relation to its assessment of mergers during the COVID-19 pandemic, covering, *inter alia*, information-gathering, the timing of investigations, the conduct of meetings and hearings, as well as how it will approach interim measures and substantive assessment. Recognising that the current environment may lead more firms involved in mergers to fail financially, the guide is accompanied by an Annex that summarises its "failing-firm" test as well as the CMA's position in relation to the relevance of COVID-19 to its merger review.

The CMA has said that its "overall approach" to assessing mergers "remains unchanged". Nonetheless, it has said that it is "conscious of the challenges" that businesses are facing and that it will seek to take these challenges into account where possible. In particular, the guidance notes that "where a business's financial difficulties do not meet the conditions of the exiting firm counterfactual, the implications of those financial difficulties (where appropriately evidenced) could still be considered within the CMA's competitive assessment".

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

FRANCE

France issues interim measures requiring Google to negotiate in good faith with press publishers the terms and conditions for the re-use of their content

On 9 April 2020, the French Competition Authority (the "FCA") issued *Decision n° 20-MC-01 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse* ordering interim measures against Google LLC, Google Ireland Limited and Google France ("Google") for the alleged abuse of its dominant position on the French market for general search services, contrary to Article L. 420-2 of the French Code of Commercial Law ("Code de commerce") and Article 102 Treaty on the Functioning of the European Union ("TFEU"), as well as Article L. 420-2, paragraph 2 of the same which prohibits the abuse of economic dependence. The interim measures require Google to negotiate in good faith with French press publishers and press agencies the terms and conditions governing the use of their content (article extracts, photos, infographics, videos, etc.) on various Google services, in particular Google Search, and to continue to display this content during the negotiation period.

By way of background, the French law of 24 October 2019 on neighbouring rights, which transposes Directive 2019/790 into national law, gives press publishers the right to authorise or prohibit the reproduction of content such as article extracts, photos, infographics and videos by digital platforms with the objective of setting out a balanced remuneration between press publishers, news agencies and digital platforms for the re-use of the latter's content.

In anticipation of the entry into force of the law on neighbouring rights, Google announced that it would no longer display the content concerned within its various services, including Google Search, Google News and Discover, unless the publishers granted it the authorisation to display the material free of charge, thus aiming to apply a similar policy and agreements it had previously reached with publishers in other EU Member States such as Germany and Spain under similar national legal frameworks.

In November 2019, the FCA received complaints from unions representing press publishers, including Syndicat des éditeurs de la presse magazine and l'Alliance de la presse d'information générale, as well as Agence France-Presse, a news agency, alleging that Google's practices constituted an abuse of a dominant position as well as an abuse of economic dependence. In addition to the complaint on the merits of the case, the complainants sought interim measures requiring Google to engage in negotiations for the remuneration of the re-use of their content.

In its decision of 9 April 2020 on interim measures, the FCA found it unnecessary to rule on whether there was an abuse of economic dependence pursuant to Article L. 420-2, paragraph 2 of the French Code of Commercial law. The FCA merely recalled the legal framework, leaving any in-depth assessment to be carried out in the investigation on the merits.

For the purpose of imposing interim measures, it sufficed for the FCA that Google appears to have a dominant position on the French market for general research services which, it found, is characterised by strong barriers to entry. With a share of around 90% of this market at the end of 2019, the FCA considered that Google's market position is likely to take on the "*extraordinary*" or exceptional aspect noted by the Commission in the *Microsoft* case.

The FCA found that at this stage of the investigation, under a *prima facie* view, Google's denounced practices are likely to be qualified as abuse of dominant position on several grounds:

i. Imposing unfair trading conditions

By unilaterally announcing its zero remuneration policy and refusing to engage in negotiations, Google may have imposed on publishers and news agencies unfair transaction conditions which would have allowed it to avoid any form of negotiation and remuneration for the re-use and display of protected content under neighbouring rights legislation.

ii. Discriminating among publishers

By imposing a principle of zero remuneration on all publishers across the board and without examining their respective situations, Google may have treated economic actors with different situations in the same way without any plausible or objective justification, which may have resulted in a discriminatory practice.

iii. Circumventing the objective of the law

The FCA also took the view that Google could have abused its dominant position by circumventing the law on neighbouring rights through the systematic request of free licences for the display of the content of press publishers without any possibility of remuneration. At the same time, it displayed article headings on its platforms, taking the view that these fall outside the scope of the neighbouring rights legislation. To the FCA, Google's positions are difficult to reconcile with the purpose and scope of the law, which it found aim to tilt the balance in favour of press publishers and provide remuneration for the digital re-use and display of their content.

The FCA therefore qualified Google's practices as being harmful to the press publishers. In particular, the FCA held that the extent of Google's dominant position on the market of general search services made it "*irreplaceable*" and "*essential*" in bringing traffic to the websites of publishers and news agencies. Pursuant to the complainants' data, search engines represent between 26% and 90% of the redirected traffic to their pages, and according to the FCA such traffic is crucial for publishers who cannot afford to lose any share of their digital readership due to the existing economic difficulties of the sector. Thus, implicitly, the FCA characterises Google Search as an "essential facility" access to which must be provided on fair and reasonable terms.

Moreover, according to the FCA, press publishers and news agencies have no other available choice but to adhere to Google's zero remuneration display policy because no-display is synonymous with the loss of traffic and therefore of income. For these reasons, the FCA considered that publishers are pushed to accept conditions which appear to be even less favourable than those which pre-existed the neighbouring rights legislation.

The FCA rejected Google's arguments that its practices were objectively justified. In particular, Google had argued that its practice of requiring the publishers' authorisation for the use of their content was compatible with the relevant European and national legislation on neighbouring rights. It also pointed out that the German competition authority had previously found that similar practices did not violate competition law.

Ultimately, the FCA found that Google's practice brought about a serious and immediate damage to the press sector which justifies the imposition of interim measures pursuant to Article L.464-1 of the French Code of Commercial Law. It therefore ordered Google to engage in good faith negotiations with publishers and news agencies on terms and remuneration for the re-use of their protected material, within a period of three months from the initial request. Furthermore, the interim measures provide for a principle of neutrality on the way in which the protected contents are indexed, classified and presented. The negotiations must also retroactively cover the period since the entry into force of the French law on neighbouring rights.

In the meantime, and pending the final decision on the merits, Google was ordered to display the publishers' content as per their instructions as well as to provide the FCA with monthly reports on the steps taken to implement the current decision.

The decision imposing interim measures is remarkable and leaves several questions unanswered. In particular, while the FCA suggests in the decision that it would expect the parties to agree on a remuneration, the interim order does not include an express obligation to remunerate the press publishers. In fact, the FCA recognises that negotiations may result in zero remuneration. Similarly, the fact that the FCA considers the publishers as being dependent on having their content displayed on Google Search and other Google services recognises at the same time that Google provides a service of significant economic value to the press publishers. This raises the question whether Google, in its negotiations with press publishers, would be entitled to ask press publishers to pay for this service, or at least to credibly argue that Google's free of charge display of press publishers' content equates to compensation for the use of their content.

Ultimately, the question remains whether it is appropriate for a competition authority to rely on competition law in order to pursue regulatory goals such as ensuring financial support for the press industry, even though it appears that market conditions and existing business models do not appear to support such outcomes.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice provides guidance on distinction between restrictions of competition by object and restrictions of competition by effect

On 2 April 2020, the Court of Justice of the European Union (the "Court of Justice") delivered a preliminary ruling in which it provided clarifications and guidance to the *Kúria* (Supreme Court of Hungary) on the distinction between restrictions of competition "by object" and "by effect" under Article 101 Treaty on the Functioning of the European Union ("TFEU"), particularly as they relate to agreements on fixed multilateral interchange fees (MIFs) (Case C-228/18 - *Budapest Bank and Others*).

The referral to the Court of Justice from the *Kúria* originated in an investigation by the Hungarian Competition Authority ("HCA") into a 1996 agreement among a group of banks in Hungary which adopted uniform MIFs *vis-à-vis* both Visa and MasterCard (the "MIF Agreement"). Visa and MasterCard were not present at the meeting where the agreement was concluded but a copy of the agreement was sent to them. The MIF is the fee paid by an "acquiring bank" to an "issuing bank" when a credit card transaction takes place. The MIF Agreement does not set sale and purchase prices for final consumers but standardises one aspect of the cost structure of some services triggered by the use of credit cards as means of payment.

In 2009, the HCA issued an infringement decision under Article 11(1) of the Hungarian Law on unfair market practices and under Article 81(1) EC (now Article 101(1) TFEU), finding that the MIF Agreement constituted a restriction of competition both by object and by effect. The decision was addressed to 22 banks alongside Visa and MasterCard. The HCA imposed total fines of HUF 1,922 million (around € 5.5 million) on the seven banks that had initially concluded the MIF Agreement and the two credit card companies. The HCA's decision was appealed to the *Fővárosi Törvényszék* (Budapest High Court) which partially annulled the decision insofar as, according to the High Court, conduct cannot restrict competition both by object and by effect, and the conduct at issue did not restrict competition by object. The HCA appealed the High Court's decision before the *Kúria*, which stayed the proceedings and referred to the Court of Justice four questions relating to the interpretation of Article 101(1) TFEU and to the latter's application to the facts of the case.

The four questions referred to the Court of Justice addressed: (i) whether, under Article 101(1) TFEU, conduct can restrict competition both by object and by effect; (ii) whether the MIF Agreement constitutes a restriction of competition by object under Article 101(1) TFEU; (iii) whether, under Article 101(1) TFEU, Visa and MasterCard can be considered parties to an agreement amongst banks despite not directly participating in its conclusion, but merely facilitating its adoption, accepting and implementing it; and (iv) whether, under Article 101(1) TFEU, it is necessary to distinguish between direct participation in an agreement and acting in concert with the participating banks.

Of the four questions, the third and fourth were considered inadmissible by the Court of Justice due to their hypothetical nature. In relation to the first question, the Court of Justice clarified that conduct can indeed restrict competition both by object and by effect. The Court also clarified that an authority does not need to conduct an effects analysis once it finds conduct restricts competition by object, although it is not precluded from doing so if it deems such analysis appropriate.

The most interesting aspects of the Court of Justice's judgment lie in its answer to the second question. In responding to this question, the Court of Justice consolidated and clarified its case law (notably *Cartes Bancaires* and *Maxima Latvija*) on the dichotomy between restrictions of competition by object and restrictions of competition by effect. It should be noted that, in doing so, the Court of Justice followed closely the roadmap laid out by Advocate General ("AG") Bobek in his Opinion in this case, in which the AG provided clear guidance on the steps to be followed in the object/effect analysis of Article 101(1) TFEU.

In his Opinion, the AG identified a two-step analysis in the assessment of an agreement's anti-competitive object and/or effect: first, the content and objectives of the agreement are examined in order to ascertain whether the agreement falls within that category of agreements whose harmful nature is, in the light of consistent and sufficient experience, commonly accepted as easily identifiable. If the answer to this question is affirmative, the authority must, as a second step, do a "basic reality check" by examining whether some element of the legal and economic context calls into question the presumed anti-competitive nature of the agreement. If such elements are present, e.g., if there are prima facie pro-competitive effects, the "by object" characterisation cannot be established and a fully-fledged effects analysis must be conducted. If, on the other hand, such elements are not ¬prima facie present, then the conduct will be classified as a restriction by object.

The Court of Justice did not conclude definitively whether the MIF Agreement entailed a restriction of competition by object under Article 101(1) TFEU, but noted a number of elements that could cast doubt on such a characterisation. The Court of Justice provided the following instructions to the *Kúria* on how to conduct this assessment, namely that: (i) the "by object" category is relevant only if there is sufficient and consistent experience that a practice is anti-competitive; (ii) a restriction of competition by object can never be established in the abstract, but always in light of the economic and legal context, taking into account any pro-competitive effects, the nature of the affected products or services, the actual structure and conditions of operation of the relevant market(s), as well as the parties' intent; (iii) the counterfactual is relevant not only in a "by effects" analysis, but also in a "by object analysis"; and (iv) the applicable threshold for breaching the "by object" characterisation is *plausibility*, meaning that the characterisation of conduct as a restriction of competition by object is placed in doubt if there are *a priori* serious indications that the agreement at issue has pro-competitive effects or a pro-competitive rationale.

The judgment of the Court of Justice in *Budapest Bank and Others* does not rewrite the applicable case law concerning the concepts of restrictions of competition "by object" and "by effect", but nevertheless provides welcome clarifications and guidance.

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office fines technical building service providers € 110 million for bid rigging

On 27 March 2020, the German Federal Cartel Office ("FCO") announced that it had fined eleven technical building service providers a total of approximately € 110 million for engaging in bid rigging between 2005 and 2014.

The companies involved in the infringement were Caverion Deutschland, DS Elektrotherm, Engie Deutschland, Engie Gebäudetechnik (Austria), Ferrostaal Air Technolgy, Karl Lausser Heizungsbau- und Sanitär, Kraftanlagen München, Nickel, Sell, Siegle + Epple and Stingl.

The companies were found to have colluded between 2005 and 2014 on bids for the award of 37 major contracts for the design and installation of technical equipment in large building complexes such as power plants, factories, shopping centres, hotels or office buildings. Such technical equipment includes heating and air-conditioning systems, sanitary installations, electrical installations, measurement instruments and control technology as well as sprinkler systems. The contract values amounted to approximately € 100 million in one case and ranged between € 4 million and € 35 million in the other cases.

The investigation was initiated following a leniency application made by an unnamed company in November 2014. Caverion Deutschland, Nickel, Ferrostaal Air Technology, Stingl, Siegle + Epple and Engie Deutschland cooperated with the FCO within the scope of its leniency programme. These companies, as well as DS Elektrotherm and Engie Gebäudetechnik, settled and their fines became final.

Kraftanlagen München, Karl Lausser Heizungsbau- und Sanitär and Sell have each appealed the decisions to the Higher Regional Court of Düsseldorf. In relation to these appeals, the Higher Regional Court of Düsseldorf held that the FCO had brought the proceedings against the appellant companies after expiry of the limitation period. The Düsseldorf Chief Public Prosecution Office has in turn appealed against this decision before the Federal Court of Justice.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

FRANCE

Paris Court of Appeal upholds anti anti injunction judgment of the Paris Court of First Instance

On 3 March 2020, the French Court of Appeal upheld the judgment of the Paris Court of First Instance (*Tribunal de Grande Instance*) which had ordered Lenovo/Motorola ("Lenovo"), a telecommunications company, to withdraw a motion for an anti-suit injunction which that company had brought against IPCOM GmbH & Co. KG ("IPCom"), an intellectual property rights licensing and technology R&D company, before the US District Court of the Northern District of California (the "US Court") in so far as it concerns the French part of the patent at issue (see VBB on Competition Law, Volume 2019, No. 12).

In 2007, IPCom acquired a number of patents related to the 2G, 3G and 4G telecommunications technology and, in particular, EU patent EP 1 841 268 B2 (the "Patent") which concerned "*access of a mobile station to a random access channel in dependence of its user class*". The Patent was declared essential by English courts. IPCom provided a fair, reasonable and non-discriminatory ("FRAND") undertaking on the Patent to the European Telecommunications Standards Institute ("ETSI") and offered a licence to Lenovo, which manufactured and sold products incorporating the Patent. IPCom requested Lenovo to clarify its intentions as regards the proposed offer by 15 March 2019.

In response, on 14 March 2019, Lenovo brought suit against IPCom before the US Court in order to obtain a worldwide FRAND rate. On 18 September 2019, Lenovo also requested the US Court to issue an injunction against IPCom, prohibiting IPCom from filing proceedings in jurisdictions other than the United States based on the Patent (that is, an anti-suit injunction).

In response, IPCom filed on 28 October 2019 a request for a preliminary injunction with the Paris Court of First Instance requesting the French court to order a withdrawal of the motion for an anti-suit injunction which Lenovo had brought before the US Court (that is, an anti-anti-suit injunction). The anti-anti-suit injunction is a response to the practice of some courts, notably in the US, to grant injunctions which bar a party from bringing proceedings in other jurisdictions. According to the Court of Justice of the European Union (Case C-159/02, *Turner v. Grovit*), anti-suit injunctions are incompatible with the Brussels I Regulation but, in practice, a party must obey the injunction or otherwise risk being held in contempt by a US court. Thus, parties facing an anti-suit injunction in the US have asked European courts to issue an anti-anti-suit injunction to force the opposing party to withdraw their request for an anti-suit injunction in the US.

On 8 November 2019, the Paris Court of First Instance sided with IPCom on the ground that international French public order does not recognise the validity of an anti-suit injunction, except when its purpose is to enforce a contractual jurisdiction clause or an arbitral clause (see VBB on Competition Law, Volume 2019, No. 12). Lenovo appealed that judgment.

On appeal, the French Court of Appeal first held that it had territorial jurisdiction over the case because the grant of the anti-suit injunction by the US Court deprived IPCom of its right of action before a French court to enforce the French part of the Patent.

On the merits, the French Court of Appeal ruled that the anti-suit injunction brought by Lenovo violated IPcom's rights under the French Intellectual Property Code (namely that a patent confers an exclusive right to exploit the invention), the Charter of Fundamental Rights of the European Union (in particular Article 17, which protects intellectual property rights) and the European Convention of Human Rights (in particular the right to a fair trial under Article 6 and the right to an effective remedy before a national authority under Article 13). The French Court of Appeal also found it relevant that the duration of the anti-suit injunction proceeding before US courts could take several years while IPCom's Patent was set to expire on 15 February 2020. The anti-suit injunction would in effect have deprived IPCom from its right to protect its industrial and intellectual property in France.

On this basis, the French Court of Appeal confirmed that the appropriate remedy in this case was to order Lenovo to withdraw the anti-suit injunction it had brought before the US Court, under a daily penalty per violation.

Paris Court of Appeal rejects request for a preliminary injunction brought on the heels of an anti-anti-suit injunction in a FRAND case

On 20 January 2020, the Paris Judicial Tribunal (*Tribunal Judiciaire de Paris*, or "Court") dismissed the request made by IPCom for a preliminary injunction against Lenovo/Motorola's French subsidiary and its distributors. The Court found that the request for preliminary injunction was not proportionate in light of the circumstances of the case under Directive 2004/48 on the enforcement of intellectual property rights (the "IPR Enforcement Directive").

As the appeal described above concerning the anti-anti-suit injunction was pending, IPCom filed a request for a preliminary injunction to have removed from the French market nearly all of the phones manufactured by Motorola and the laptops and tablets produced by Lenovo which were alleged to have infringed IPCom's patents related to the 2G, 3G and 4G telecommunications technology. Lenovo/Motorola argued that the removal of their devices from the French market would cause them substantial financial and reputational damage and that this was not justified in light of the short remaining lifespan of the patent, which was set to expire on 15 February 2020.

The Court sided with Lenovo. The Court recalled that, under recital 22 and Article 3 of the IPR Enforcement Directive, provisional measures for the immediate termination of an alleged infringement had to be proportionate, fair and equitable in the circumstances of a given case. Here, the Court noted that the preliminary measures requested by IPCom would cause serious financial and reputational harm to Lenovo and that this harm was not justified since the patent was set to expire on 15 February 2020. The Court also considered it important that IPCom was a non-practising entity which did not personally exploit the patent at issue and, therefore, that the products put on the market by Lenovo did not cause a loss of market share. According to the Court, IPCom had not established that the absence of provisional measures would have caused it harm that could not be remedied by damages once the court decides on the merits whether or not the patents at issue were, in fact, infringed. On this basis, the Court dismissed IPCom's request for a preliminary injunction.

It is not entirely clear from the judgment why the French Court applied a proportionality test rather than the framework set out by the Court of Justice of the European Union in its landmark C-170/13, *Huawei v. ZTE* case. This may be due to the fact that the *Huawei* test constitutes guidelines, or that the French Court felt that this framework was not appropriate in preliminary injunction proceedings. The French ruling is not unlike a judgment previously delivered by the District Court of the Hague on 1 August 2019, in a case pitting Xiaomi against Sisvel, in which it considered that FRAND disputes were too complex to be pleaded and decided upon in the short timeframe of preliminary injunction proceedings.

THE NETHERLANDS

Dutch Competition Authority accepts Roche commitments regarding supply of testing materials for SARS-CoV-2 test

On 3 April 2020, the Dutch competition authority (*Autoriteit Consument en Markt* or "ACM") published a press release expressing its satisfaction with commitments made by Roche Diagnostics ("Roche") regarding the supply of testing materials for the SARS-CoV-2 test.

Roche, which the ACM says has a "key position" for testing equipment and materials in the Netherlands, had been accused of withholding such materials, including lysis buffer solution, a reagent used to break open cells. On 26 March 2020, the Dutch second Parliamentary Chamber even voted on a resolution which observed a shortage of that solution, attributed blame for the alleged shortage to Roche, and called on the government to compel Roche to share the recipe, if necessary by relying on a compulsory patent licence.

Roche rejected the allegations and pointed out that it had not even claimed patent protection for the recipe. According to Roche, which pointed out that it had developed the first SARS-CoV-2 test in record time, the issue had arisen because Roche could not guarantee the safety and reliability of test results if the reagents were produced in facilities not under its control.

For its part, ACM made it clear that Roche had exhibited a "constructive attitude" by sharing the recipe for lysis buffer solution and helping in expanding production. This is why ACM did not consider further action necessary. In passing, ACM pointed out that it had worked closely with the European Commission as many Member States are grappling with similar problems.

Dutch Court grants SEP injunction in absence of any defence or counterclaim

On 26 February 2020, the Court of The Hague (the "Court") handed down a judgment in a case pitting Sisvel, a licensing company, against Sun Cupid Technology (H.K.) LTD and other companies of the same group ("Sun Cupid"), an importer and seller of 4G smartphone products which incorporate the LTE standard in Europe. The Court granted Sisvel a preliminary injunction in connection with an infringement of a Standard Essential Patent ("SEP").

Sisvel acquired from Nokia patent EP 2 139 272 (the "Patent") which relates to the 4G/LTE 3GPP standard and which is part of the Universal Mobile Telecommunications System ("UMTS") standard. The Patent was declared essential. On 22 March 2015, Sisvel informed Sun Cupid about its licensing programme but, after Sun Cupid refused to accept a licence, Sisvel brought suit against Sun Cupid before a Dutch Court for infringement of the Patent.

The case is remarkable because the legal representation of Sun Cupid withdrew, without any new appointment, and thus no defence or counterclaim was submitted. In this context, the Court reached the conclusion that the majority of Sisvel's claims were justified and not contested. The Court did not refer to the licensing principles as set out by the Court of Justice of the European Union in *Huawei v. ZTE* (see VBB on Competition Law, Volume 2015, No. 7).

Accordingly, the Court granted an injunction to Sisvel for the infringement by Sun Cupid of the Dutch part of patent EP 2 139 272 B1. The Court also ordered Sun Cupid to recall and destroy all the infringing products and inform all of its Dutch resellers.

STATE AID

– EUROPEAN UNION LEVEL –

Court of Justice partially annuls judgment of the General Court in the Larko saga (Larko v. Commission, C-244/18 P)

On 26 March 2020, the Court of Justice partially annulled the judgment of the General Court concerning State aid granted by Greece in the context of the privatisation of Larko, a large nickel producer. The Court of Justice found that the ruling at first instance had wrongly applied the Private Operator Principle in the context of the analysis of a State guarantee. In particular, the General Court wrongly ruled that a Private Operator would have been aware that, at the time of the State aid, Larko was in difficult financial conditions and it would not have granted a guarantee under the conditions applied by Greece. The Court of Justice ruled that this finding was wrongly based on the assumption that – in the absence of any evidence showing that Greece had considered Larko's financial conditions – the Greek authorities had not acted as a prudent investor. In addition, the first instance judgment wrongly referred to evidence dating after the grant of the State aid. In an interesting *obiter dictum* the Court of Justice added that the General Court failed to consider the *context* in which that State aid was granted. This may potentially lead to a greater level of scrutiny by the EU Courts of the circumstances considered by the Commission in the application of the Private Operator Principle in the future.

Amendments to the Covid-19 Temporary Framework: The Commission expands the scope of State aid to tackle the outbreak

On 19 March 2020, the Commission adopted the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak ("Temporary Framework"). On 4 April 2020, it published a first amendment to the Temporary Framework, which significantly broadens its scope of application. The amended Temporary Framework covers five additional categories of State aid: (i) support for coronavirus-related research and development (R&D); (ii) support for the construction and upscaling of testing facilities; (iii) support for the production of products relevant to tackle the coronavirus outbreak; (iv) targeted support in the form of deferral of tax payments and/or suspensions of social security contributions; and (v) targeted support in the form of wage subsidies for employees. In addition, the amended Temporary Framework provides for higher thresholds of State aid amounts. It should also be noted that on 9 April, the Commission launched a consultation with Member States to further extend the scope the Temporary Framework. Therefore, another amendment may soon be adopted.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Commission publishes Temporary Framework for assessing antitrust issues related to business cooperation in response to COVID-19 outbreak

On 8 April 2020, the Commission published a Temporary Framework to assess possible forms of business cooperation in response to the emergency situation caused by the COVID-19 pandemic. More specifically, the Temporary Framework seeks to provide guidance to companies considering cooperation in order to ensure the supply and distribution of essential products, including medicines and medical equipment. The Temporary Framework envisages cooperation between undertakings that are already active in the health sector, as well as between undertakings that are active in other sectors, which for example decide to convert part of their production lines to start producing scarce products.

First, the Temporary Framework aims to outline the Commission's enforcement priorities during this crisis and to establish the main criteria on the basis of which the Commission will assess cooperation projects addressing the shortage of essential products and services. According to the Commission, an adequate response to this crisis might require varying degrees of cooperation.

On one hand, the Temporary Framework identifies a number of activities which may lawfully be entrusted to a trade association, an independent advisor, a public body, or an independent service provider, provided that they are subject to sufficient safeguards (e.g., ensuring that no individualised company information flows back to competitors). Such activities include:

- coordinating joint transport for input materials;
- contributing to identifying those essential medicines for which there are risks of shortages;
- aggregating production and capacity information, without exchanging individual company information;
- modelling demand on a Member State level and identifying supply gaps; and
- sharing aggregate supply gap information, and requesting participating undertakings, on an individual basis and without sharing information with competitors, to indicate whether they can fill the supply gap to meet demand (either through existing stocks or increase of production).

On the other hand, the Temporary Framework acknowledges that cooperation between businesses might require a degree of cooperation which would under normal circumstances raise EU competition law concerns. By way of example, overcoming critical supply shortages may require measures to adapt production, stock management, exchanges of commercially sensitive information and a level of coordination on which site produces which medicines, while others remain in under-production. However, in light of the current crisis, the Commission considers that cooperation measures may either be not problematic under EU competition law or would not give rise to an enforcement priority for the Commission, provided that they are:

- designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those used in the treatment of COVID-19;
- temporary, i.e., applied only as long as there exists a risk of shortage or, in any event, during the COVID-19 outbreak; and
- not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.

To determine whether a cooperation project is problematic under EU competition law or whether it should constitute an enforcement priority, the Commission will also take account of the fact that such cooperation is encouraged, coordinated and/or carried out within a framework set out by a public authority. In any event, cooperation between businesses – for example, in the form of organising production and delivery to meet an urgent need to maintain the functioning of healthcare for COVID-19 patients – must be allowed when it stems from an imperative request from public authorities to undertakings.

Second, where there is still uncertainty about whether contemplated initiatives are compatible with EU competition rules, the Temporary Framework sets out an exceptional procedure for DG Competition to provide *ad hoc* guidance to undertakings and trade associations on specific cooperation projects aimed at addressing the shortage of essential products and services during the outbreak. In this context, the Commission will, exceptionally and at its own discretion, provide its guidance by way of ad hoc comfort letters. To this end, DG Competition has set up a dedicated webpage and an e-mail address that can both be used to seek informal guidance on specific initiatives. Companies and trade associations that seek guidance from the Commission are requested to provide detailed information on the initiative, including: (i) the firm(s), product(s) and service(s) concerned; (ii) the scope and set-up of the cooperation; (iii) the aspects that may raise concerns under EU competition law; and (iv) the benefits that the cooperation seeks to achieve and an explanation as to why the cooperation is necessary and proportionate to achieve said benefits under the current circumstances.

Third, the Temporary Framework emphasises that the present circumstances require that both undertakings and consumers enjoy the continued protection of competition law. Accordingly, the Commission will actively monitor relevant market developments to detect anticompetitive conduct on the part of undertakings which seek to exploit the crisis to unlawfully collude or abuse their dominant position. In particular, the Temporary Framework identifies the following behaviours as problematic: (i) exploiting consumers and customers by charging prices above normal competitive levels; and (ii) limiting production to the ultimate prejudice of consumers by obstructing attempts to scale up production to face shortages of supply. Therefore, undertakings and citizens are encouraged to report suspected cartels and antitrust violations, including abuses of dominant positions, through the leniency or whistle-blower tools at their disposal.

The Temporary Framework has been applicable since 8 April 2020 and will remain so until its withdrawal by the Commission, which may review it depending on the evolution of the COVID-19 outbreak.

DG Competition sets up new unit to serve EU strategic priorities

The Directorate-General for Competition has set up a new "Commission priorities and strategic coordination" unit reporting directly to Director-General Olivier Guersent. The unit has been tasked with coordinating work related to the Commission's strategic priorities by bringing together the know-how of internal Commission procedures and sectoral expertise based on case work, in areas such as technology. Its objective is to ensure that DG Competition efficiently advances President Von der Leyen's policies, including a planned reform of technology regulation and the push for climate neutrality.

Launch of consultation on EU review of market definition

On 3 April 2020, the Commission launched a six-week consultation on its roadmap for the review of the 1997 Notice on the definition of the relevant market for the purposes of Community competition law (the "Market Definition Notice"). Overall, the review aims at determining whether the Market Definition Notice is still "fit-for-purpose" and, as such, sets out a clear, consistent and accessible approach to market definition in competition cases across different industries.

The Market Definition Notice will be assessed for effectiveness, efficiency, relevance, coherence, as well as the extent to which it has contributed to ensuring a consistent approach to market definition by the Commission and EU national competition authorities. It will also be evaluated for consistency with relevant EU case law and changes brought to the legal competition framework since 1997.

At this stage, citizens and stakeholders are invited to communicate their views on the Commission's understanding of the issues and identification of possible solutions, and to provide any relevant information they may have. The roadmap is open for feedback until 15 May 2020. The Commission has announced that it will subsequently hold a public consultation of at least twelve weeks in the second quarter of 2020, a conference or workshop with technical experts and representatives from all main stakeholders groups in the fourth quarter of 2020, as well as discussions with EU national competition authorities.

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